# UNITED STATES DISTRICT COURT
# CENTRAL DISTRICT OF CALIFORNIA

**ENGINE MANUFACTURERS ASSOCIATION, ET AL.,**

**Plaintiff,**

**vs.**

**SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,**

**Defendants.**

**CV 00-09065 FMC (BQRx)**

**ORDER DENYING PLAINTIFF'S MOTION FOR ORDER IMPLEMENTING THE SUPREME COURT'S DECISION**



This matter is before the Court on the Motion for an Order Implementing the Supreme Court's Decision (docket no. 124) of Plaintiffs Engine Manufacturers Association and Western States Petroleum Association, filed January 24, 2005. The Court has read and considered the moving, opposition and reply documents submitted in connection with this motion. Following oral argument on May 2, 2005, the Court took this matter under submission. For the reasons and in the manner set forth below, the Court hereby **DENIES** Plaintiffs' Motion.

## I. Background

The South Coast Air Basin ("the Basin"), which includes Los Angeles, San Bernadino, Riverside, and Orange Counties, experiences the most serious air quality problems in the nation, primarily due to motor vehicle

pollution. In response to the need for the Basin to reduce pollution levels dramatically to comply with national ambient air quality standards ("NAAQS") for pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public wealth or welfare," 42 U.S.C. § 7408(a)(1)(A), as mandated by the Clean Air Act, 42 U.S.C. §§ 7401-7671q ("CAA"), the California State Legislature adopted Health and Safety Code § 40447.5, which authorizes Defendant South Coast Air Quality Management District ("the District") to adopt fleet rules in an effort to reduce public exposure to motor vehicle pollution. Specifically, § 4044.7.5 provides:

> Notwithstanding any other provision of law, the south coast district board may adopt regulations that do all the following:
> (a) Require operators of public and commercial fleet vehicles, consisting of 15 or more vehicles under a single owner or lessee and operating substantially in the south coast district, when adding vehicles to or replacing vehicles in an existing fleet or purchasing vehicles to form a new fleet, to purchase vehicles which are capable of operating on methanol or other equivalently clean burning alternative fuel and to require that these vehicles be operated, to the maximum extent feasible, on the alternative fuel when operating in the south coast district.

On June 16, 2000, August 18, 2000, and October 20, 2000, the District adopted six rules (the "Fleet Rules"), each of which mandates that when certain local operators of fleets purchase or replace their fleet vehicles, they must acquire only those specific motor vehicles that the District has designated as meeting its requirements.

The Fleet Rules apply variously to governmental agencies, including federal agencies and private actors. Fleet Rule 1191, relating to passenger car, light-duty trucks, and medium duty vehicles, applies to government agencies and special districts, defined as "any public agency that provides public services such as, but not limited to, sanitation, school, transit, air, and water districts." Rule 1191(c)(11). Rule 1192 applies to public transit fleets, whether operated by government agencies or by private entities under contract to government agencies. Rule 1193 applies to public and private sold waste collectors–government agencies and private entities that operate solid waste collection fleets with 15 or more vehicles. Rule 1194 pertains to public and private fleet operators that transport passengers to and from commercial airports operated in the District. Rule 1186.1 applies to public and private sweeper fleet operators. Rule 1196 applies to public fleet operators of heavy-duty vehicles.[1]

On November 21, 2000, Plaintiffs challenged the constitutionality of the Fleet Rules under the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, cl.2, contending that they are preempted by Section 209, 42 U.S.C. § 7543(a), of the CAA. On August 22, 2001, this Court entered summary judgment against Plaintiffs. Section 209 provides in part: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to control of emissions from new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a). This Court reasoned that Section 209 was intended to ensure uniformity of regulations as they pertained to vehicle manufacturers. *Engine*

[1]A seventh Fleet Rule was implemented in 2001 applying to school busses. Rule 1195 applies to busses operated in the Basin by public and private entities.

*Manufacturers Ass'n v. South Coast Air Quality Management District*, 158 F. Supp. 2d 1107, 1117 (C.D. Cal. 2001). The Fleet Rules imposed no regulations on manufacturers, but only purchasers. *Id.* Additionally, the Court concluded that the Fleet Rules did not impose a "standard relating to the control of emissions" because they did not impose "any numerical control on new vehicles." *Id.* Rather, they limited the purchase of vehicles to a "subset of previously certified California vehicles." *Id.* at 1120. Section 246 of the CAA, 42 U.S.C. § 7586, expressly recognizes that fleet rules must be established in areas with particularly high pollution levels. The Court concluded that it is "not rational to conclude that the CAA would authorize purchasing restrictions on the one hand, and prohibit them, as a prohibited adoption of "standard" on the other." *Id.* at 1118. In light of the presumption in favor of the valid exercise of local police power and against preemption, the Court concluded that Section 209 did not preempt the Fleet Rules. *See id.* at 1119.

The Ninth Circuit summarily affirmed the decision, and the United States Supreme Court granted certiorari. *See Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 124 S. Ct. 1756 (2004). The Supreme Court reversed, concluding that Section 209 preempted the adoption or attempted enforcement of "standards" whether they were enforced on manufacturers, sellers, or purchasers. *Id.* at 1761-62. The "criteria referred to in § 209(a) relate to the emission characteristics of a vehicle or engine. To meet them the vehicle or engine must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution control-device, or must have some other design feature related to the control of emissions." *Id.* The Court held that "standards" are

therefore different from "methods of standard enforcement." In other words, the Court concluded that a state violates Section 209 by adopting or attempting to enforce a "standard," whether a new numerical emission limitation or emission control technology is imposed or not: a state violates Section 209 by implementing a new method of enforcement of already existing and federally approved standards. *See id.* at 1762-1763.

The Court, however, did not conclude that all the Fleet Rules, or that all applications of them, were preempted. *Id.* at 1764. It remanded the case to this Court to address "a number of issues." *See id.* Specifically, the Supreme Court asked this Court to consider: (1) "the scope of petitioner's challenge;" (2) "whether some of the Fleet Rules (or some applications of them) can be characterized as internal state purchase decisions (and, if so, whether a different standard for pre-emption applies);" and (3) "whether § 209(a) pre-empts the Fleet Rules even as applied beyond the purchase of new vehicles (*e.g.*, to lease arrangements or to the purchase of used vehicles)." *Id.* at 1764-65.

Plaintiffs thereafter brought the instant motion, addressing each of the issues raised by the Supreme Court and arguing that the Fleet Rules were preempted in their entirety. Defendants, the District and the Natural Resources Defense Council, contend that at least some of the applications of the Fleet Rules fall with the market participant exception to preemption and are therefore valid. *Amicus Curiae* State of California argues in opposition to Plaintiff's Motion, contending that the State of California has the statutory and state constitutional authority to delegate to the District the power to make purchasing decisions, which it has done. *Amicus Curiae* the American Automotive Leasing Association argues in support of Plaintiff's Motion that

Section 246 of the CAA preempts the Fleet Rules notwithstanding the effect of Section 209.

## II. Discussion

### A. Scope of Plaintiffs' Challenge

The Supreme Court directed the Court to consider the scope of Plaintiffs' challenge. The Court interprets this to mean that it should examine whether Plaintiffs are challenging all the Fleet Rules and all applications of the Fleet Rules. Plaintiffs have brought a facial challenge to the constitutionality of the Fleet Rules. *See* Transcript of Oral Argument at 3-4 *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 124 S. Ct. 1756 (2004) (No. 02-1343), *available at* 2004 WL 136400. In other words, Plaintiffs are challenging all six of the Fleet Rules and each of their applications, whether imposed on federal, local, state, or private actors. Plaintiff's Motion for an Order Implementing the Supreme Court's Decision at 2 ("Plfs' Mot.").

### B. Whether the Fleet Rules Are Internal Purchasing Decisions

#### 1. Whether the Market Participant Doctrine Applies to the Clean Air Act

The Supreme Court did not consider whether the Fleet Rules, or some applications of them, may be considered internal purchasing decisions. If they are so characterized, they may fall outside the preemptive effect of Section 209. The Court has recognized that unlike regulatory actions, actions by a state that are proprietary in nature–that is, related to the buying or contracting for the goods and services the state needs to function– may not be preempted by federal laws.

In *Building and Constructions Trades Council v. Associated Builders and*

*Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993), the Court held that notwithstanding the preemptive effect of the National Labor Relations Act ("NLRA"), the state of Massachusetts could require successful bidders to a public construction contract to agree to abide by terms of a labor agreement. *Id.* at 222-224. This was because the State was acting as a market participant, making decisions in the same manner as a private market participant, not as a regulator. The Court reasoned that there were two types of preemption under the NLRA: (1) the NLRA preempts conduct by states that provides its own regulatory or judicial remedies for conduct prohibited by the NLRA; and (2) it preempts conduct by states that regulates that which the NLRA intended to be left to the free market. *Id.* at 224-227. Proprietary action by the state falls within neither of these two categories. *Id.* at 227. The Court concluded that its holding was supported both by "NLRA pre-emption principles generally" and by the language of the NLRA. *Id.* at 230.

The so-called market participant doctrine has been applied outside of the NLRA context as well. In *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1050 (9th Cir. 2000), *abrogated on other grounds*, *City of Columbus v. Our Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002). the Ninth Circuit applied the exception to the Federal Administration Authorization Act ("FAAA"). There, the City of Santa Ana, California, imposed certain requirements on the towing companies that had contracted with the city to provide towing services for vehicle impoundment. *Id.* at 1043. The Court found that the city was acting as a market participant and therefore its action was not

preempted by the FAAA.[2] The Court concluded that the market participant doctrine could apply in a context outside of the NLRA. *Id.* at 1050. It held that it was appropriate to apply it to the FAAA because the language and purpose of the FAAA preemption provision allowed for a market participant exception. *Id.* Specifically, the Court held that the preemption provision excluded actions that do not have the "effect of law." Proprietary actions do not have the "effect of law." *Id.* The exception was consistent with the purpose of the FAAA because the FAAA was "uniquely designed to encourage the deregulation of the motor carrier industry," and the city's policies allowed the city "to contract with the party who is able to deliver the most inexpensive, efficient, and reliable towing services by acting as any other private consumer would in a competitive market." *Id.* In short, the market participation doctrine could apply to the FAAA because it would be consistent with congressional intent to apply it. *Id.*

*Associated Builders* and *Tocher* illustrate the nature of the market participation doctrine as tied to congressional intent. *See Associated Builders*, 507 U.S. at 231 (examining "what Congress intended with respect to the State and its relationship to the [labor] agreements authorized by [the NLRA]"); *Tocher*, 219 F.3d at 1050 (considering the language of the FAAA and its purpose); see also *Associated General Contractors v. Metropolitan Water District*, 159 F.3d 1178 (9th Cir. 1998) (applying the market participation doctrine so as to preclude preemption under ERISA and concluding that proprietary actions do not have the "effect of law"). The doctrine is not based on the conclusion that states have inherent power over their spending

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[2]The FAAA expressly preempts state enactment or enforcement of a "law, regulation, or other provision have the force and effect of law related to a price, route, or service of any motor carrier . . . " 49 U.S.C. § 14591(c)(1).

as much as on the conclusion that the state actions are not preempted by the terms of the federal statute. *See Wisconsin Dep't of Industry, Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986) (noting that the market participant doctrine does not reflect any "general notion regarding the necessary extent of state power in areas where Congress has acted"). Congress is free to preempt state proprietary actions if it so wishes; "[c]ongressional purpose is the 'ultimate touchstone of preemption analysis.'" *Id.* at 290. Therefore, determining whether the market participation doctrine applies in a particular statutory context requires the court to interpret the federal statute. More specifically, the court must analyze the (1) language and (2) purpose of the statute at issue. *See Tocher*, 219 F.3d at 1050.

The Supreme Court has cautioned that preemption provisions should be narrowly and strictly construed. *See Kelly v. Robinson*, 479 U.S. 36, 47 (1986); *see also Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998). The CAA explicitly protects the authority of states to regulate air pollution. The first section of the CAA, 42 U.S.C. § 7401 states, "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Furthermore, the Supreme Court is highly deferential to state laws in areas traditionally regulated by the states. *Exxon Mobil Corp. v. U.S. E.P.A.*, 217 F.3d 1246 (9th Cir. 2000). "Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state. Environmental regulation has traditionally been a matter of state authority."

*Id.* at 1255. Therefore, the authority of the states is assumed not to have been preempted unless it was the clear and manifest purpose of Congress to do so. *Id.* at 1256.

It was not the "clear and manifest purpose of Congress" to preempt state proprietary actions under Section 209. Section 209 prevents a state from adopting or attempting to enforce "any standard relating to the control of emissions." State proprietary actions could be included within the broad definition of "attempt[ing] to enforce any standard" articulated by the Supreme Court. The Supreme Court concluded that any method of enforcement is preempted, whether it be directed at manufacturers, sellers, or buyers. There is no principled distinction between an enforcement mechanism aimed at private buyers or public buyers under the Supreme Court's definition. *See Engine Manufacturers Ass'n*, 124 S. Ct. at 1761-62. However, the Supreme Court's opinion must be interpreted in light of the entire CAA. At 42 U.S.C. § 7416, entitled "Retention of State Authority," Congress reserves the rights of the states to regulate air pollution except in three specific areas, identified by statute. One such statute is Section 209. However, § 7416 describes each of those statutes as "preempting certain State *regulation* of moving sources." Congress' use of the word "regulation" in this context expresses its vision for the scope of the preemptive provisions. "Regulation" excludes state proprietary actions. *See Associated Builders*, 507 U.S. at 1196. Congress did not "clearly and manifestly" intend that "attempt[ing] to enforce any standard" should include proprietary actions because it characterized the statute as pertaining only to state regulation. Section 7416 therefore limits the reach of the Supreme Court's definition of "attempt[ing] to enforce any standard." Applying the market participant

doctrine to preemption under the CAA would therefore be consistent with the language of the statute.

Applying the market participant doctrine is also consistent with the purposes of § 209. The CAA "explicitly preserved this principle: 'Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State." *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 64 (1975). Excluding proprietary actions by the state from Section 209 is consistent with placing the responsibility for curbing air pollution with the states, because it provides an avenue aside from regulation–the market–through which the state can positively affect the environment. Furthermore, the purpose of Section 209 is to ensure national uniformity so that manufacturers are not forced to build multiple engines. *See People of State of Cal. ex rel. State Air Resources Bd. v. Dep't of Navy*, 431 F. Supp. 1271, 1285 (N.D. Cal. 1977). Application of the market participant doctrine to the CAA would not interfere with this purpose, even if every state chose to make purchasing decisions that furthered a clean environment. The state's purchasing decisions, because they are not regulation, do not compel manufacturers to meet any new emissions limit, and they have no discernable impact on private markets (or at least, the Plaintiffs have not so argued). Therefore, state purchasing decisions neither directly nor indirectly interfere with national uniformity for manufacturers.

The Court concludes that Congress did not intend to include state proprietary actions in the scope of Section 209, and that the market participant doctrine applies to the CAA. The next question for the Court is whether the Fleet Rules in fact constitute proprietary action.

**2. Whether the Fleet Rules are Proprietary**

The key inquiry is whether by enacting the Fleet Rules the state is acting in a regulatory or proprietary capacity. *Tocher*, 219 F.3d at 1049. A state may not "use the guise of privity of contract to conduct otherwise forbidden regulatory activity." *Id.* When a "state uses its spending power to shape the overall . . . market in a manner that is essentially non-proprietary, the market participant exception will not apply and the state action may be subject to . . . preemption." *Chamber of Commerce v.Lockyer*, 364 F.3d 1154, 1162 (9th Cir. 2004). The Ninth Circuit has articulated a two-part test for whether the state is acting as a proprietor:

> First, does the challenged action essentially reflect the entity's own interest in the efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties under similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that the primary goal was to encourage a general policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.

*Id.* at 1162. (quoting *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999)).

The first prong, "which looks to the nature of the expenditure, protects comprehensive state policies with wide application from preemption, as long as the type of state action is essentially proprietary." *Id.* The second prong is focused on the scope of the expenditure–even if the spending decisions do

not necessarily reflect a state's interest in efficient procurement of goods or services, they will be preserved if they "also do not have the effect of broader social regulation." *Id.* at 1163. Put another way, as long as the spending decisions are related to the performance of a contract with a state, and do not have an impact beyond that contract, the scope is narrow enough that the state will not be considered a regulator. *See also Big Country Foods, Inc. v. Bd. of Educ. of the Anchorage Sch. Dist.*, 952 F.2d 1173, 1178 (9th Cir. 1992) ("In making the determination whether a state is acting as a market participant or regulator, a court must examine whether the state or local government has imposed restrictions that 'reach beyond the immediate parties with which the government transacts business.'") (quoting *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 211 n.7 (1983)); *see also Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001), *judgment vacated on other grounds by City of San Antonio v. Stucky*, 536 U.S. 936 (stating that "the distinction between a state acting in its regulatory capacity in contrast to its proprietary capacity is most readily apparent when the government purchases goods and services that its operations require in the open market").

Contrary to Plaintiffs' argument, *Lockyer* is not primarily concerned with the *efficiency* of the purchasing decision or whether the narrow scope of the state action "defeat[s] an inference that its primary *goal* was to encourage a general policy rather than address a specific proprietary problem." *Lockyer*, 364 F.3d at 1162. Although this language is used in *Lockyer*, the court quickly elaborates. Regarding the first test, the question is not whether the action is "efficient," but whether it is "proprietary." Regarding the second test, the question is not whether the purpose and goal was to regulate, but whether the *effect* is to regulate. The court makes it clear that either test is

sufficient to categorize a state action as proprietary. The Court reads *Locker* in light of the Ninth Circuit's elaboration on the two tests.

To the extent that the Fleet Rules apply to local and state government actors, they constitute proprietary action by the state. As to the first *Lockyer* test, the state is acting with regard to its own need to procure goods, and is doing so in a manner that is consistent with the behavior of private parties. Local and state governments need to procure vehicles for their operations, including transit and school busses, street sweepers and trash trucks, regardless of whether the Fleet Rules apply. The Fleet Rules set requirements for the use of government funds with regard to that procurement need. They place no obligations on any entity that are not related to the purchase of vehicles. As the court stated in *Building & Construction Trades Dep't v. Allbaugh*, 295 F.3d 28, 35 (D.C. Cir. 2002), the "Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity." Here, the state is, in its own estimation, making the most effective use of its funds. Furthermore, the District acts as a private actor would in setting the procurement requirements. Private actors may consider more than cost or availability in making procurement decisions. As the District has shown, private actors may decide to use clean- burning vehicles out of concern for the environment, to reduce long-term costs, or to gain professional goodwill. *See* Decl. of Julie Masters, Exhs. 1, 2 (discussing the procurement policies of UPS and FedEx for their fleets and the decision to use alternative fuel vehicles).

The second *Lockyer* test is also satisfied by the Fleet Rules' application to state and local government actors. The Fleet Rules set no mandates

beyond those related to the purchase of vehicles. The requirements placed on state and local purchasing decisions are related to the performance of a contract with a state: specifically, they identify what the subject matter of a contract for the purchase of a vehicle may be. Additionally, they do not have a social impact beyond the contract between the government and the person or entity selling the fleet vehicle. While they may have the long-term effect of cleaning the environment, such an effect is not forbidden so long as the Fleet Rules do not impose obligations outside the sales contract for a fleet vehicle. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 (1976) (in the context of the dormant commerce clause, stating that a state may further the purpose of protecting the State's environment by entering the market). Therefore, the Fleet Rules as they pertain to state and local governments are narrow enough in scope that they do not constitute broad social regulation.

Plaintiffs' argument that *Gould* governs the outcome of this case is unavailing. In *Gould*, the Court considered whether Wisconsin could prohibit state procurement agents from purchasing "any product known to be manufactured or sold by any person or firm including on [a] list of labor code violators." *Gould*, 475 U.S. at 283-84. Although the state was acting through its procurement officials in making purchasing decisions, the Court concluded that the market participant exception did not apply. It reasoned that "on its face the . . . statute serves plainly as a means of enforcing the NLRA. The State concedes, as we think it must, that the point of the statute is to deter law violations and to reward 'fidelity to the law'." *Id.* at 287. Plaintiffs argue that the Fleet Rules are like the statute in *Gould* because they too are motivated by a desire to regulate. In *Associated Builders*, the Supreme Court later clarified the holding in *Gould*: the reason the statute in *Gould* was

regulatory was that it "addressed conduct unrelated to the employer's performance of contractual obligations to the state, and because the State's reason for such conduct was to deter NLRA violations." *Associated Builders*, 507 U.S. at 229. Here, however, the Fleet Rules address conduct related to the performance of contractual obligations to the state. Specifically, they state what characteristics fleet vehicles must have, and those characteristics bear on the suitability of the vehicle for the purpose it serves. In *Gould*, whether the party contracting with the state had committed labor violations had no bearing on whether the subject matter of the contract satisfied its purpose.

Additionally, although the reason for the requirements of the Fleet Rules is to protect the environment, this alone is not sufficient to remove the Fleet Rules from the purview of the market participant exception. *See Associated Builders*, 507 U.S. at 229 (noting that *Gould* did not hold that purchasing decisions "may never be influenced by labor considerations"); *Stucky*, 260 F.3d 424, 438 n.19 (5th Cir. 2001) (stating that even though the city may have "initially" acted for "safety reasons," its actions were proprietary and escaped preemption); *cf. Alexandria Scrap*, 426 U.S. at 809 (concluding that the state "entered the market" for environmental reasons, but that its conduct was nevertheless proprietary). Plaintiffs have not cited a single case wherein the *sole* reason the court concluded the action was regulatory was the purpose or motivation of the legislature. In *Gould* and *Lockyer*, as the Court has discussed, not only were the purposes regulatory, but the mechanism went beyond the market and created requirements unrelated to a contract with the state. *See Associated Builders*, 507 U.S. at 229 (discussing *Gould*); *Lockyer*, 364 F.3d at 1163; *Washington State Building &*

*Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982) (in considering a statute that prevented radioactive waste from entering the state under the commerce clause, that it was cast in regulatory terms *and* that it denied "entry of waste at the state's borders rather than at the site the State is operating as a market participant").

On the other hand, statutes have been upheld when, despite a regulatory purpose, they limited their impact to the government and the party contracting with it and did not have a broad social impact. In *Stucky*, the court acknowledged that despite an initial regulatory impulse, the "proprietary nature of the [government's] need to procure . . . services" rendered the statute proprietary. *Stucky*, 260 F.3d at 438 n.19 (commenting on *Cardinal Towing & Auto Repair, Inc v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999)). Similarly, in *Babler Bros. v. Roberts*, 995 F.2d 911, 916 (9th Cir. 1993), the court examined a rule requiring those who contracted with the state of Oregon to pay time and a half to employees for hours worked in excess of eight hours a day unless they were covered by a collective bargaining agreement. The Court concluded that the statute was not preempted by the NLRA. Although it acknowledged, in discussing a challenge brought under the Equal Protection clause, that "Oregon has demonstrated a legitimate governmental interest in the regulation of workers' maximum work hours for public projects," in discussing the market participant exception, it noted, "the state is enforcing proscribed working conditions on public projects in which the state and local jurisdictions have a proprietary interest." *Babler*, 995 F.2d at 916; *cf. Alexandria Scrap*, 426 U.S. at 806, 809 (noting that a state regulates when it "interfere[s] with the natural functioning of the market," and that the state's reason for entering the

market is not determinative). Therefore, the fact that the purpose of the Fleet Rules was to regulate the environment does not mean that they cannot be essentially proprietary in nature.

Plaintiffs argue that the Fleet Rules do not make purchasing decisions but "instruct others as to what they are allowed to purchase if and when they decide to make purchases." Plfs' Mot. at 3. However, this does not render the Fleet Rules non-proprietary. In *Big Country Foods,* the state of Alaska required school districts, in acquiring milk for federal school lunch and breakfast programs, to prefer Alaska suppliers. *Big Country Foods*, 952 F.2d at 1178. The court held that such action was proprietary. The court rejected the argument that Alaska imposed a "'downstream' requirement by forcing school districts to enter into contracts on terms set by state regulation." *Id.* The court concluded that a "state should not be penalized for exercising its power through smaller, localized units; local control fosters both administrative efficiency and democratic governance." *Id.* at 1179. "A rule that would consider *all* political subdivisions as separate from state control for market participant purposes would be anomalous to the proposition that political subdivisions exist at the will of the state. A rule that would consider *some* political subdivisions as separate from state controls would lead to difficult case-specific inquiries into the degree of subdivision autonomy." *Id.* *Big Country Foods* at least stands for the proposition that the mere fact that a governmental sub-division is directed to make purchases in a certain manner does not make the state action regulatory as opposed to proprietary. Even more importantly, however, it illustrates that the State of California may delegate its purchase decision-making power to its subdivisions by way of a mandate without making the action regulatory as opposed to proprietary.

Plaintiffs argue, however, that the District "lacks any authority to purchase on behalf of the governmental entities that are subject to its jurisdiction." Plfs' Mot. at 3. California Health and Safety Code § 40447.5 grants authority to the District to create rules requiring fleet operators "to purchase vehicles which are capable of operating on methanol or other equivalently clean burning alternative fuel and to require that these vehicles be operated, to the maximum extent feasible, on the alternative fuel when operating in the south coast district." Plaintiff has not seriously challenged the validity of this delegation. California itself would have the power to direct the purchasing decisions of its subdivisions. *See Leland v. Lowery*, 26 Cal. 2d 224, 227 (1945) ("It cannot be doubted that the Legislature has the power, within constitutional limitations, to enact terms upon which the state (or counties, its political subdivisions) will contract to spend public moneys for public work."). California may delegate this power as long as it sets criteria for the exercise of that power. *Clean Air Constituency v. California State Air Resources Board*, 11 Cal. 3d 801, 816-817 (1974); *Kugler v. Yocum*, 69 Cal. 2d 371, 375-76 (1968). The criteria for the exercise of power by the District are clearly set forth in § 40447.5. The District therefore had the authority to implement the Fleet Rules and direct government actors in their purchasing decisions.[3]

Next, Plaintiffs identify several characteristics of the Fleet Rules that

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[3]Plaintiff argues that the Fleet Rules are regulatory because they "do not present the question whether the [District] could use its own funds to purchase, or subsidize the purchase of, vehicles meeting the emission standards prescribed by the Fleet Rules." Plfs' Mot. at 7. Plaintiff does not explain why this inquiry is relevant in determining whether the Fleet Rules are proprietary actions. Moreover, when viewed as an exercise of delegated power imposed on the political subdivisions of California, it is clear that the District need not use its own budget to be acting in a proprietary manner.

tend to show they are part of a regulatory, as opposed to proprietary, scheme. They argue that: (1) the rules apply to purchases by federal agencies and private actors; (2) they were adopted pursuant to the California Health & Safety Code, which gives power to the District to adopt "regulations;" (3) the delegation of power to the District to make the Fleet Rules is part of a larger scheme granting regulatory power to the District, *see, e.g.*, Cal. Health & Safety Code §§ 40440 (granting the district the power to "adopt rules and regulations" related to control technology, promoting cleaner fuels, providing transportation controls, and requiring retrofit controls for power plants); (4) the Fleet Rules are enforceable with criminal sanctions and provide provisions for auditing and enforcement; (5) the legislative history of California statute authorizing the Fleet Rules evidences a regulatory purpose. In other words, Plaintiffs contend that "the Fleet Rules have all the characteristics of regulatory action by government and none of the characteristics of proprietary action." Plfs' Mot. at 6. None of these characteristics alter the fundamental nature of the Fleet Rules as proprietary.

Although the Fleet Rules could be applied in a non-proprietary manner, they still fall within the market participant doctrine. Therefore, even if the Fleet Rules would not be proprietary if applied to the federal government or private actors, they are still proprietary when applied to state and local governments.

Plaintiffs have cited no authority for the proposition that it is the labeling of a government action as either "regulatory" or "proprietary" that determines its nature. Such a rule would negate the need for the *Lockyer* test, which asks the court to look to the actual nature of the action, not just to the legislature's understanding of the nature of the action. *See also Tocher*, 219

F.3d at 1047 (finding an action proprietary that was instituted under the authority to "regulate towing businesses"); *Gould*, 475 U.S. at 289 ("It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.") (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292 (1971)).

Furthermore, the placement of the authority for the Fleet Rules within a legislative scheme granting the authority to implement regulations does not make every action taken by the District regulatory. *See Lockyer*, 364 F.3d at 1162 (stating that "comprehensive state policies with wide application" may be proprietary); *Allbaugh*, 295 F.3d at 35(concluding that "blanket rule[s]" may be proprietary); *Tocher*, 219 F.3d at 1047-1050 (finding one aspect of a scheme to regulate the towing business to constitute proprietary action). At most, Plaintiff's argument indicates an understanding by the legislature that it was implementing regulations, but again, this understanding is not controlling. *See Stucky*, 260 F.3d 424, 438 n.19 (5th Cir. 2001) (stating that even though the city may have "initially" acted for "safety reasons," its actions were proprietary and escaped preemption).

The fact that the Fleet Rules are enforceable with criminal sanctions and audits does not change their proprietary character. From *Big Country Foods*, it is clear that if the legislature mandates purchasing decisions by its sub-divisions, it may still be acting in a proprietary manner. *Big Country Foods*, 952 F.2d at 1178. The ability to mandate without the ability to sanction for failure to comply or to measure compliance with a mandate is meaningless. Plaintiffs have cited no authority for the notion that the availability of criminal sanctions or other enforcement procedures is determinative in whether a particular action is characterized as regulatory or

proprietary.

Finally, Plaintiffs argue that the legislative history of the statute authorizing the Fleet Rules indicates that the legislature understood its action as regulatory. This argument is in line with many of the arguments advanced by Plaintiffs–that the legislature was motivated by a desire to regulate. The legislative history, like many features of the law authorizing the Fleet Rules that Plaintiffs discuss, serves only to establish what neither party disputes: that the purpose of the Fleet Rules is to curb air pollution. However, this purpose alone does not make the Fleet Rules regulatory. The government, just like a private party, may make proprietary decisions for any number of reasons. As they are applied to state and local governments, the Fleet Rules extend only to that in which the government has a proprietary interest–its fleet vehicles–and therefore, by their nature, they are proprietary.

*Amicus Curiae* the American Automotive Leasing Association ("AALA") argues that § 209 notwithstanding, the Fleet Rules are preempted by § 246, which sets forth the requirements for the state implementation of fleet rules under the CAA. 42 U.S.C. § 7586. AALA contends that § 246 conflicts with and trumps the Fleet Rules. However, AALA does not explain why the market participation exception should not apply with equal force to preemption under § 246 as under § 209. AALA makes no argument that § 246 was intended to cover purchases of fleet vehicles by the government. In fact, AALA's argument demonstrates that application of the Fleet Rules to state and local government purchases would not undermine the purposes of § 246. AALA argues that "Congress' purpose in establishing the section 246 program was to ensure that fleets were regulated uniformly in the most heavily polluted areas of the country, specifically including Los Angeles."

AALA *Amicus* Memorandum at 7 (citing 58 Fed. Reg. 32,474, 32,476 (June 10, 1993); 59 Fed. Reg. 50,042, 50,043 (Sept. 30 1994)). AALA contends that there is a danger that an operator of a fleet would be exposed to different geographic areas and consequently, different fleet regulations, absent uniformity of regulations. *See also* 58 Fed. Reg. at 32,476 (stating that "the need for uniformity among state programs is very important for fleets operating in more than one state"). However, there is no reason to conclude that fleet vehicles operated by state and local governments would function in more than one state or region. Application of § 246 to state and local government purchases would be outside the policy articulated by the Environmental Protection Agency. The market participation doctrine serves to preclude preemption under either § 209 or § 246.

The Court concludes that the Fleet Rules, as applied to state and local government actors, fall within the market participant doctrine and are therefore outside the scope of § 209. The Court does not address the two other applications of the Fleet Rule discussed by the parties–the application of the Fleet Rules to the federal government and private actors. Neither does the Court address whether the Fleet Rules are preempted as applied to used or leased vehicles. Plaintiffs have brought a facial challenge. A facial challenge to a legislative enactment "is the most difficult challenge to mount successfully," and it will be upheld only when the plaintiff can "establish that no set of circumstances exists under which the [enactment] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The Court has concluded that the Fleet Rules are constitutional as applied to state and local governments. Therefore, Plaintiffs have not met their burden of demonstrating that there is no set of circumstances under which the Fleet

Rules are valid. Because Plaintiffs have not met this burden, their challenge to the Fleet Rules fails.

## III. Conclusion

The Fleet Rules, as applied to state and local governments, fall within the market participant doctrine. They are not preempted. Plaintiffs' facial challenge fails. Plaintiff's Motion is DENIED.

May 5, 2005

FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT